Supreme Court, U.S.
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CASE NO. 98-1495

IN THE UNITED STATES SUPREME COURT
October Term 1998

CHRISTIAN CHIEJINA,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Is it reasonable and permissible under the Fourth Amendment to detain a suspected internal drug carrier at a border, who has refused consent to an x-ray examination where no medical justification is evident, for a sufficient time, without judicial intervention, to permit the passage of the ingested material? (Restated.)

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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *Chiejina v. State*, 721 So. 2d 748 (Fla. 3d DCA 1998). [A1].[1] The trial court's order granting the motion of Petitioner to suppress the evidence is not reported. [A9].

JURISDICTION

The Third District Court of Appeal of Florida's opinion was filed on November 4, 1998 and rehearing was denied on

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[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Petitioner's Appendix to his Petition.

December 17, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, § 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the communication to be intercepted, and the nature of the evidence to be obtained.

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution,

STATEMENT OF THE CASE AND FACTS

Petitioner, Christian Chiejina, was the Appellee in the Third District Court of Appeal of Florida. In the trial court Petitioner was charged with trafficking in heroin. On Petitioner's motion to suppress, the trial court suppressed 1.31 pounds of heroin seized following an eight day warrantless detention of Petitioner, based on the conclusion that although the initial detention was reasonable its length was unreasonable. [A2]. The facts of the case, as set forth by the Third District Court of Appeal of Florida in its decision reversing the trial court's order, are as follows:

> The facts of this case are particularly repugnant, however we are compelled to address them in detail as they are essential to our analysis. At the suppression hearing, the state presented the testimony of Senior Customs Officer Nicholas Orlandi (Orlandi). Orlandi testified that on May 14, 1996, he was working at Miami International Airport when he was asked by a Customs supervisor to interview defendant, who had arrived on a flight from Jamaica. Defendant told Orlandi that he was an architect and a native of Nigeria, who lived in New York and worked as a taxi dispatcher. He stated that he had gone to Ecuador to visit a girlfriend and then to Jamaica to visit friends. Orlandi testified that both Ecuador and Jamaica were "source countries" for drugs. Defendant carried a passport and credit cards, but only $20 in cash. Based on this information and his training and experience, Orlandi suspected that defendant was carrying narcotics in his alimentary canal. Defendant was read his Miranda rights and asked to allow an x-

ray to be taken of his stomach. He refused to waive his rights or be x-rayed. Orlandi testified this behavior was further indicative that defendant was a "swallower" because in his experience a person who was not a smuggler would waive his rights and allow the x-ray. Defendant further aroused Orlandi's suspicion by suddenly, and for no apparent reason, asserting that he was tired and then lying down on the floor.

Defendant was taken into custody and transported to Ward D at Jackson Memorial Hospital. Once at Ward D, suspected swallowers are asked to walk because exercise usually stimulates a bowel movement. Orlandi testified that defendant initially refused to walk about, refused consent for medical service in the event of an emergency and refused to eat, asserting that the nurse was trying to poison him. Defendant later ate very small amounts of dry cereal in the morning and drank sips of water.

During the first few days at Ward D, defendant soiled his pants and was given fresh clothing three or four times a day. This was indicative of the fact that defendant was actually squeezing liquids out of his rectum, while not moving his bowels. Defendant continued to refuse to eat in order not to have a bowel movement. Orlandi testified that at one point defendant blew his nose and upon inspection of the tissue feces was observed, which was indicative of the fact that defendant had passed some drugs and then re-swallowed them. After it became apparent that defendant was re-swallowing his feces, he was

> handcuffed to a wheelchair. On May 21, 1996, seven days after defendant was detained, he passed nine pellets of heroin. Thereafter, he had several more bowel movements until he passed a total of thirty-eight pellets of heroin.
>
> Defendant testified that after the first night of his detention he was handcuffed to a wheelchair twenty-four hours a day. He was not allowed to go to the restroom and was given a bedpan. Defendant testified that he slept in the wheelchair and was only allowed to shower twice, once while handcuffed and once without the handcuffs. Defendant denied eating his fecal matter or blowing his nose as described. [A2-A4].

Based on the foregoing facts, the trial court found that the initial stop and detention of defendant was reasonable. However, the trial court found that the prolonged, eight-day detention was unreasonable as it was one of a particular offensive manner and done without judicial approval or extraordinary circumstance to justify the lengthy delay. As such, the trial court suppressed the heroin. [A4].

The Third District began its analysis by noting that a traveler's expectation of privacy is less at the border than in the interior, and finding that, pursuant to this Court's opinion in *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct 3304, 87 L. E. 2d 381 (1985), the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border. The court then recognized this Court's holding that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the

facts surrounding the traveler and [his] trip, reasonably suspect that the traveler is smuggling contraband in [his] alimentary canal." *Id.* 473 U.S. at 541. [A4].

The Petitioner in this case arrived from Jamaica, was a native of Nigeria, and had traveled through Ecuador. All three of these nations are "source countries" for narcotics. Although defendant had a passport and credit cards, he carried only twenty dollars in currency. Orlandi testified that this was consistent with a swallower who was a U.S. resident, as they are often paid here and thus travel with little cash. Orlandi's suspicion was heightened further when defendant refused a request that he submit to an x-ray examination. This refusal, the Third District, found was significant since an x-ray examination would have easily determined whether the reasonable suspicion that the Petitioner was concealing contraband was justified. As such, the Third District found that the trial court correctly determined that defendant's initial detention was reasonable. [A4-A5].

The Third District then turned to the trial court's evaluation of the propriety of Petitioner's continuing detention and conclusion that its length and nature rendered it unreasonable. The court recognized that circumstances may arise that could render a traveler's continued detention an unreasonable seizure, and therefore unconstitutional. The court relying on this Court's opinion in *Montoya de Hernandez* held that where a traveler at the border is reasonably suspected to be an internal drug carrier and refuses to consent to an x-ray examination without any medical justification, it is permissible to detain the suspect "until [his] bodily processes dispel the suspicion that [he] will introduce a harmful agent into this country." 473 U.S. at 544. [A5-A6]

The Third District recognized that United States Circuit Court of Appeals in *United States v. Adekunle*, 980 F.2d 985

(5th Cir. 1992) and *United States v. Esieke*, 940 F.2d 29 (2nd Cir. 1991) have adopted a rule that requires the agency overseeing detentions to inform the prosecuting attorney within 24 hours of its decision to detain a suspected smuggler, who must in turn immediately notify a judge and the detainee's counsel of the continued detention. However, the Third District rejected the judicial supervision requirement since it is inconsistent with this Court's position in *Montoya de Hernandez* that "the detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border: both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country. *Id.* 473 U.S. at 544. [A6-A7].

In applying the foregoing holding, the Third District found that the length and nature of Petitioners's eight-day detention resulted solely from the his extreme evasive actions of refusing to eat and walk about, desperately avoiding having a bowel movement, and even swallowing his own feces. While the length of the detention and the unsavory events that followed may be offensive, it is equally apparent that the Petitioner alone was responsible for his situation and that he was, at all times, capable of ending the ordeal by consenting to an x-ray or by simply allowing nature to take its course. Accordingly, the Third District concluded that the trial court erred in finding that Petitioner's continued detention was unreasonable and reversed the trial court's order granting Petitioner's motion to suppress evidence and remanded the case for trial. [A7].

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW THAT WHERE A TRAVELER AT THE BORDER IS REASONABLY SUSPECTED TO BE AN INTERNAL DRUG CARRIER AND REFUSES TO CONSENT TO AN X-RAY EXAMINATION WITHOUT ANY MEDICAL JUSTIFICATION, IT IS PERMISSIBLE TO DETAIN THE SUSPECT, WITHOUT JUDICIAL INTERVENTION, UNTIL THE SUSPECT PASSES THE INGESTED MATERIAL IS THE CORRECT STATEMENT OF THE LAW AND THUS THE WRIT SHOULD BE DENIED.

In *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985), the Court considered the unique problems presented by the advent of alimentary canal smuggling. The Court found that in accordance with "Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." Id. 473 U.S. at 538. The Court also emphasized that individuals presenting themselves for entry into the United States have a lesser expectation of privacy at the border than in the interior. Id. 473 U.S. at 539-40. Based on these considerations, the Court stated:

> We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably

> suspect that the traveler is smuggling contraband in her alimentary canal.
>
> The "reasonable suspicion" standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard, officials at the border must have a "particularized and objective basis for suspecting the particular person" of alimentary canal smuggling.

Id. 473 U.S. at 541-42. In essence, the Court concluded that an extended border detention of a suspected alimentary canal smuggler would not violate the Fourth Amendment, so long as reasonable suspicion supported the decision to detain the suspect.

The Court then went on to consider whether the more than sixteen hour "detention of [Montoya] was reasonably related in scope to the circumstances which justified it initially." Id. 473 U.S. at 542. The Court's analysis of this issue began with an admonition that "courts should not indulge in 'unrealistic second-guessing,' " and that " 'creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.' " *Id.* The Court went on to make the following observations:

The rudimentary knowledge of the human body which judges possess in common with the rest of humankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops. It presents few, if any external signs: a quick frisk will not do, nor will even a strip search. In the case of respondent the inspectors had available, as an alternative to simply awaiting her bowel movement, an x-ray. They offered her the alternative of submitting herself to that procedure. But when she refused that alternative, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose into the interior carrying the reasonably suspected contraband drugs.

The inspectors in this case followed this former procedure. They no doubt expected the respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature, which the court below called "heroic," disappointed this expectation and in turn caused her humiliation and discomfort. Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions and that principle applies here as well. Respondent alone was

> responsible for much of the duration and discomfort of the seizure.

Id. 473 U.S. at 543, (citations omitted). Accordingly, Montoya's detention was held to be reasonable under the Fourth Amendment.

Justice Stevens concurred in the judgment based on his belief that the prolonged detention of Montoya was justified by her choice of refusing to consent to an x-ray examination that would have easily determined whether the reasonable suspicion that she was concealing contraband was justified. Justice Stevens would have held that customs agents may require that a nonpregnant person reasonably suspected of alimentary canal drug smuggling to submit to an x-ray examination as an incident to a border search. *See United States v. Oyekan*, 786 F. 2d 832 (8th Cir. 1986) (reasonable suspicion that a person is an alimentary canal smuggler may justify an involuntary x-ray examination); *United States v. Vega-Barvo*, 729 F. 2d 1341 (11th Cir. 1984) (pre *Montoya* case holding that customs inspectors need not seek a search warrant to perform an x-ray examination on an individual who is detained based on reasonable suspicion that the individual is an alimentary canal smuggler).

In the instant case, reasonable suspicion supported the decision to detain the Petitioner as an alimentary canal smuggler. The extended border detention was reasonable because Petitioner refused to submit to an x-ray examination.[2] His extended

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[2] Another alternative would be to allow for an x-ray examination based upon a reasonable suspicion that the individual is an alimentary canal smuggler. The existence of reasonable suspicion and the propriety of the x-ray examination which would be the basis for the warrantless arrest, as with all warrantless arrests, would be determined

detention, without judicial intervention, until he moved his bowels is all that is required by the Fourth Amendment. Judicial intervention during an extended detention, such as the one under consideration, could only result in the judicial approval of the detention until the suspect moves his bowels or an order forcing the suspect to submit to an x-ray examination. In both situations the end result would be the same, a determination of whether the suspect is in fact a drug smuggler.

The Petitioner herein controlled the length of his detention and it could have lasted only long enough to have an x-ray examination. The results thereof would have either ripened the reasonable suspicion that Petitioner was trafficking in illegal drugs to probable cause or he would have been released from detention. If probable cause was established, Petitioner would have been arrested and promptly taken to a neutral magistrate to determine if probable cause existed for the warrantless arrest. It was Petitioner's attempt to evade detection which did not allow the customs officer to complete his investigatory detention. Thus, Petitioner should not be permitted to benefit from his voluntary decision to forego an x-ray examination and extend his detention. *Stewart v. LaGrand*, _ U.S. __, 118 S. Ct. 1018, __ L. Ed. 2d__ (1999) (petitioner waived his claim that his execution by lethal gas violated his

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after the fact by a detached neutral magistrate. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). This would allow the prompt determination by a neutral magistrate that probable cause existed for the arrest. The Fourth Amendment does not require a prompt determination by a neutral magistrate that reasonable suspicion exists in an extended border detention situation. Requiring an x-ray would protect the rights of all individuals from the harm caused by illegal drug smuggling and those individuals wrongly suspected of alimentary canal smuggling. It would be the quickest and safest method to determine whether the individual is an alimentary canal smuggler.

Eighth Amendment right to be free from cruel and unusual punishment by choosing to be executed by lethal gas rather than lethal injection).

CONCLUSION

Based on the foregoing reasons, the Respondent, the State of Florida, respectfully requests that this Court deny the Petition for Writ of Certiorari to the Third District Court of Appeal of Florida.

Respectfully submitted,

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